TAN GUAN SENG v. SIBUTI YON SENG QUARRY SDN. BHD. & ORS.

[F.C. (Ismail Khan C. J., Gill F.J. and Pawan Ahmad J.) July 24, 1973]

[Kuching — Federal Court Civil Appeal No. 41 of 1972]

Practice and Procedure — Misnomer — Order to substitute defendant — When takes effect — Limitation — R.S.C. 1957, O. 16 r. 11 — Sarawak Land Code, s. 34(6).

Land Laws — Appeal from decision of superintendent — Period of limitation — Sarawak Land Code, s. 34(6).

In this case the respondents had claimed a right of way over land belonging to the appellant. The Superintendent of Lands and Surveys held an inquiry and decided in favour of the respondents. The appellant gave notice of appeal but cited the superintendent as the respondent. The superintendent thereupon applied for and obtained an order for the substitution of the respondents in his place as respondent in the appeal. When the appeal came on for hearing, it was contended on behalf of the respondents that as the order for substitution was made 30 days after the period of limitation for appeal set out in section 34(6) of the Land Code, the appeal was barred. The learned judge agreed with the submission and dismissed the appeal. The appellant thereupon appealed to the Federal Court.

Held: the appeal against the substituted respondents could only be deemed to be lodged on the day when they were substituted and as this was after the expiry of the period of limitation, the appeal was out of time.

Cases referred to:-

(1) *Colgate-Palmolive (Asia) Ltd.* v. *Swedish East Asia Co. Ltd.* [1967] 1 M.L.J. 115, 118.

(2) *Davies* v. *Elsby Brothers Ltd.* [1960] 3 All E.R. 672, 675.

(3) *Whittam* v. *W. J. Daniel & Co. Ltd.* [1961] 3 All E.R. 796.

FEDERAL COURT.

Tan Choi Yu for the appellant.

Matthew Chan for the respondents.

Ismail Khan C.J.: We dismissed this appeal and indicated that we would give our reasons later. This we now do.

This is an appeal from the decision of the learned judge of the High Court at Kuching, dismissing the appeal against the decision of the Superintendent of Lands and Surveys, Fourth Division, Sarawak (hereinafter called the superintendent), declaring a right of way over a piece of land at Bukit Sarit, Bekenu Road, Bekenu, comprised in Sibuti Lease of Crown Land No. 12838, Sarawak (hereinafter called the said land). The appellant is the owner of the said land. The respondents are the proprietors or occupiers of parcels of land situate to the northwest of Bekenu Road. They had no means of access from their properties to other areas, except through the said land. They, therefore, claimed a right of way over it.

The appellant resisted this claim. The matter was referred to the superintendent. At the inquiry into the dispute, he held in favour of the respondents and issued a certificate in respect of the right of way on the 25th February, 1971. The appellant was informed of the decision on 3rd March, 1971. Section 34(6) of the Land Code provides for an appeal. It reads:—

"(6) Any person aggrieved by any decision of the superintendent under this section may, within thirty days of being informed of such decision, appeal to the High Court and for the purpose of further appeal any decision of the High Court shall be deemed to be made in a Civil Proceeding."

On 8th March, 1971 the appellant gave a notice of appeal. It cited the superintendent as the respondent. On the 17th July, 1971, the superintendent applied for and obtained an order of court for the substitution of the respondents in his place as respondent in the appeal.

At the hearing of the appeal before the learned judge, counsel for the respondents contended, *inter alia*, that as the order for the substitution was made on the 28th August, 1971, that is, 30 days after the period of limitation set out in section 34(6) of the Land Code, the appeal was barred. The learned judge agreed with the submission and dismissed the appeal.

Before us, counsel for the appellant referred to his memorandum of appeal. In his diffuse and rather nebulous written submissions, he argued that the learned judge was wrong in holding that the appeal was out of time. He submitted that the substitution of the respondents for the superintendent was the correction of a mere misnomer and that the substitution was only a change of name for another in respect of the same entity. As, in his submission, the amendment made on the 20th August, 1971 was only the correction of a misnomer, it could be made after the lapse of the period of limitation. He referred to the case of *Colgate-Palmolive (Asia) Ltd.* v. *Swedish East Asia Co. Ltd.*(1) in which the following cases were dealt with: *Davies* v. *Elsby Brothers Ltd.*(2) and *Whittam* v. *W. J. Daniel & Co. Ltd.*(3) In *Colgate's* case, Winslow J. said:—

"... In all the reported cases relating to misnomer there has usually been a strong resemblance between the two names with some minor variation which a court has sometimes allowed to be corrected on the ground that the old name and the new name were intended to refer to the same person...."

In our view, the learned judge was right in deciding that the amendment was not the correction of a misnomer. It would be idle to pretend that the description "Superintendent of Lands and Surveys" and the names of the respondents referred to the same person. They are two distinct entities. The above cases relate to the amendment of writs. In the instant case, what was amended was a notice of appeal whereby the respondents were substituted for the superintendent.

At the inquiry before the superintendent, the parties to the dispute were the respondents who claimed the right of way, and the appellant who opposed such claim. In the appeal by the appellant against his decision, the party claiming the right of way should have been made respondent and not the superintendent, the adjudicator. It is difficult to understand why he was made the respondent. He therefore took the right step in obtaining the order for the substitution of the respondents in his place. See Order 16 rule 12 which says:—

"12. Any application to add or strike out or substitute a plaintiff or defendant may be made to the court or a judge at any time before trial by motion or summons, or at the trial of the action in a summary manner."

The respondents were added as a new party in place of the party removed. Such being the case, Order 16 rule 11 comes into operation. It says:—

"11. Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner

hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice."

In the instant case, the learned judge made no order as to the service of the amended notice, nor was there any order that service thereof be dispensed with. The order for substitution was made on the 20th August, 1971. So the appeal as against the substituted respondents could only have been lodged, at the very earliest, on the day when they were substituted, that is, some months after the expiry of the period of limitation.

It is true that there was no appeal against the order, but that does not deprive the respondents of their vested right to plead that the appeal was barred by limitation. (*Colgate-Palmolive (Asia) Ltd.* v. *Swedish East Asia Co. Ltd.*[1] *ibid*).

For these reasons, we dismissed the appeal.

Appeal dismissed.

Solicitors: *Ee, Lim, Tai & Leong; Chan & Co.*

RE JOSEPH DE CRUZ JAMES & ANOR.; MARGARET ROSE v. MANOMANI KANDIAH

[O.C.J. (Abdul Hamid J.) August 20, 1973]

[Kuala Lumpur — Originating Summons No. 369 of 1972]

Land Laws — Deed of trust of land for child — Land transferred to former wife "as trustee" — Entry in memorandum of transfer — Whether may be construed as declaration of trust — Whether transfer valid — National Land Code, ss. 301(d) and 344.

The deceased who was the registered owner of a piece of land executed a deed of trust of the land in favour of his daughter. Subsequently he executed a transfer of the land to his former wife, the respondent, the mother of the child "as trustee". In the memorandum of transfer under the column "consideration" it was stated "Pemberian kapada anak mengikut surat amanah yang bertarikh 26hb Jun, 1970" (Gift to daughter in accordance with a deed of trust dated 26 June 1970). It was argued that the transfer was void as it disclosed a trust and was therefore caught by section 301(d) of the National Land Code.

Held: (1) by transferring the property to a person "as trustee", the deceased in this case had complied with the condition in paragraph (d) of section 301 of the National Land Code read together with section 344 of the Code;

(2) the entry in the memorandum of transfer was effected essentially for the purpose of showing that the gift to the child was the consideration for the transfer and the entry could not be construed to be a declaration of trust or an intention to declare a trust.

Cases referred to:-

(1) *Shephard* v. *Cartwright* [1955] A.C. 431 at p. 449.

(2) *Palaniappa Chettiar* v. *Arunasalam Chettiar* [1962] M.L.J. 143.

ORIGINATING SUMMONS.

K. Chelvanayagam for the applicant.

Datuk Athi Nahappan for the defendant.

Abdul Hamid J.: This is an application by Margaret Rose asking the court —

(1) To determine whether upon the true construction of the deed of trust dated 26th of June, 1970 and the memorandum of transfer dated July 1, 1970 read together or either of them is valid and of any effect in law, having regard to its execution, its terms, its attestation and its stamping;

(2) To determine whether upon the like construction of the said deed of trust it is capable or incompetent in law of founding a good and valid consideration in effecting a transfer of the land held under Q.T.(R) No. 4179 Lot 6, Town of Petaling Jaya;

(3) And upon such determination, for a declaration of the rights of the parties hereto, that is to say, the rights of the applicant as the lawful widow of Joseph De Cruz James as upon an intestacy and the legal right of the respondent as trustee;

(4) And if the determination be that the said deed of trust and/or the memorandum of transfer is incapable in law of being a good and valid deed of trust or memorandum of transfer, or, if the deed of trust is incompetent in law of founding or supporting a good and valid consideration for effecting the transfer of the said land and title to the respondent as trustee: then,

(a) For an order that the registration of transfer of the said land in favour of the respondent be declared null and void.

(b) For an order that the respondent do deliver up the issue document of title of the said land to the Senior Assistant Registrar, High Court, Kuala Lumpur, for transmission to the Deputy Registrar of Titles, Petaling Jaya, Kuala Lumpur, for rectification of the register and issue document of title and make all necessary memorials to give effect to the order of this Honourable Court.

(c) For a declaration that the current lawful registered proprietor of the said land is Joseph De Cruz James or alternatively there is a resulting trust unto him.

(d) For an order that the issue document of title to the said land be kept in the custody of the Senior Assistant Registrar, High Court, Kuala Lumpur, pending application for and grant of letters of administration to the estate of Joseph De Cruz James deceased, then unto the said administrator.

From the affidavit before the court, it is revealed that the applicant is the widow of Joseph De Cruz James the executor of the trust deed who died on October 11, 1970 (hereinafter referred to as "the deceased"). The respondent was the first wife of the deceased. The marriage between the respondent and the deceased was dissolved on ground of deceased's desertion some time at the end of 1967 and the final decree of dissolution was made on January 10, 1968.

Prior to August 13, 1970, a piece of land with premises thereon held under Q.T.(R) No. 4179 Lot 6, Petaling Jaya, in the State of Selangor (hereinafter referred to as "the said land") was registered in the name of the deceased.

On June 26, 1970, a deed of trust was executed by the deceased. On August 13, 1970, the Deputy Registrar of Titles, Petaling Jaya registered the memo-